September 15, 2010

TO: Board for Judicial Administration (BJA)

FROM: Judge Marlin J. Appelwick, Chair
BJA Public Records Work Group

RE: BJA Public Records Work Group Final Report – Executive Summary

I. Recommendation

The Public Records Work Group recommends that the Board for Judicial Administration (BJA) approve the submission of the proposed court rule regulating disclosure of judicial records, and if adopted by the Supreme Court, appoint a committee to develop best practices to facilitate implementation of that rule.

II. Introduction

The BJA appointed the Public Records Work Group in December 2009. At the time it appeared the Legislature might take up the question of whether the judicial branch should be subject to the state Public Records Act (PRA) as a response to the Supreme Court decision in City of Federal Way v. David Koenig [Appendix, tab 6]. This case strongly reinforced previous case law that records of the judicial branch of state government are not subject to disclosure under the PRA.

The charge to the Work Group was to:

1. Make recommendations regarding how the Public Records Act (PRA) should apply to the administrative records of the judicial branch as defined in GR 31 (c)(2), with consideration given to:
   --- Whether such application should be made via statutory amendments or court rule;
   --- What exemptions to the PRA are necessary for the judicial branch;

--- Application of existing court rules, statutes and common law.

2. Develop a substantive implementation proposal consistent with the recommendations.
3. Involve such other stakeholders as the work group determines necessary to develop a realistic and acceptable proposal.

The work group consisted of representatives from the appellate courts, Judge Marlin Appelwick; Superior Court Judges' Association (SCJA), Judge Ronald Culpepper; District and Municipal Court Judges' Association (DMCJA), Judge Susan Dubuisson; Administrative Office of the Courts (AOC), Mr. Jeffrey Hall; Association of Washington Superior Court Administrators (AWSCA), Ms. Marti Maxwell; District and Municipal Court Management Association (DMCMA), Ms. Aimee Vance; Washington Coalition for Open Government (WCOG), Mr. Toby Nixon and Mr. William Crittenden; Washington State Bar Association (WSBA), Mr. Robert Welden and Ms. Kristal Wiitala; Allied Daily Newspapers of Washington (ADNW), Mr. Rowland Thompson; and the Office of Public Defense (OPD), Ms. Sophia Byrd McSherry. Guests who attended one or more meetings included Senator Adam Kline, Mr. James Bamberger (OCLA), Ms. Mellani McAleenan (AOC), Ms. Kathy Kuriyama (OPD), and Mr. Doug Klunder (ACLU). The work group was staffed by three employees of the AOC. See Report, tab 5 and Appendix, tab 2.

III. Process

The work group met in eight half-day working sessions. The ambitious schedule [Appendix, tab 3] was intended to allow the submittal of a proposal before the next Court Rule deadline or legislative session. The recommendation contemplates the new rules be effective in 2012.

The work group reviewed and discussed its charge [Appendix, tab 1], reviewed state case law and court rules related to judicial records disclosure [Appendix, tabs 6, 7 and 12], heard a general overview of the PRA [Appendix 9], heard a general overview of current statutes and case law regarding access to court records and a brief history to our current status [Appendix, tabs 7 and 12], reviewed research materials compiled and analyzed by staff [Appendix, tabs 6, 7, 8, 10, 12, 13, 14, 18, 25 and 26, plus see information on reference materials at end of Report outline], agreed on basic presumptions for their work [Appendix, tabs 4 and 5], created a master list of judicial entities

[Appendix, tabs 20], created a master list of judicial records classifications currently utilized (including initial categorization of exemption status) [Appendix, tab 21 and 22], and reviewed approaches to judicial records disclosure utilized in other states including the review of texts of several states [Appendix, tabs 13 and 14].

The work group also reviewed COSCA surveys and model approaches [Appendix, tab 10], compiled and reviewed potentially applicable exemptions under the PRA [Appendix, tab 25], compiled and reviewed potentially applicable exemptions under "other statutes" [Appendix, tab 26], solicited and compiled input from judicial entities [Appendix, tab 23], reviewed summary responses from judicial entities as well as full texts of responses [Appendix, tabs 23 and 24], and wrote and reviewed analysis on questions that arose during our work (e.g. test for applying the PRA to functional equivalents of public agencies) [Appendix, tabs 7, 12, 13 and 18].

The work group drafted and utilized a "Framework Options for Rule/Statute on Public Access to Judicial Records" [Appendix, tab 16] to assist it in developing its approach to addressing its charge. Once the work group made the determination to address its charge through a proposed rule, rather than through use of the PRA or other statutory changes, the same framework assisted the group in determining components that should be in the rule and approaches to scope, process, exemptions to disclosure, non-compliance, accountability, and procedures.

The minutes of the meetings and the pertinent research materials, surveys and responses are included in the appendix.

The work group attempted, at all times, to utilize consensus for its decision-making. Members were repeatedly encouraged to submit a minority report on any issue or approach with which they disagreed. The significant areas of disagreement focused on four areas: application of PRA vs. court rule; whether the rule was too protective or too broadly provided for disclosure; protection of privacy interests of persons whose personal information may be contained in records disclosed; and impacts on small courts. The report includes those dissenting statements [Report, tab 6].

The work group believes it is very important to develop best practice and a training/implementation plan for the rule and has recommended areas to be developed [Report, tab 4]. However, the work group believed it was not the proper mix of persons to develop those practices. If the Supreme Court of Washington takes favorable action on the proposed rule, then the BJA should sponsor a work group to develop best practices/readiness recommendations, and otherwise oversight and monitor the implementation process for the new revised rule. Some members of the work group volunteered to be members of the new work group, and some members of the work group volunteered to have their represented organization furnish a member for the new work group. These include Toby Nixon of Washington Citizens for Open Government (WCOG), Rowland Thompson of the Allied Daily Newspapers of Washington (ADNW), the Washington State Bar Association (WSBA), the Office of Public Defense (OPD), the Board for Court Education (BCE), the Association of Washington Superior Court Administrators (AWSCA), and the District and Municipal Court Management Association (DMCMA).

IV. Chief Elements of Proposed Amendments to GR 31

The work group selected a court rule rather than inclusion within the PRA as the appropriate course. Some members outside the judicial branch favored placing the branch under the PRA with exemptions peculiar to the courts being added into that statute. The adoption of a court rule does not guarantee the Legislature will not attempt to cover the judicial branch in the PRA, but it does remove the need for it to do so, and avoids disagreement over separation of powers issues which might lead to awkward litigation.

The decision to present the recommendation in the form of amendments to GR 31 as opposed to a new free standing rule was a decision of the Chair. Even with a free standing rule on administrative records, some amendments to GR 31 would be required. For purposes of understanding how the rules for various types of records interacted, the Chair believed it clearer to integrate. The Supreme Court may take a different approach without doing violence to the substance of the recommendation. The provisions of GR 31 regarding case records have not been changed.

The proposed rule would apply to all judicial agencies, not just courts. The rule lists those agencies. The listing was done for purposes of clarity during

review. It may not be desirable in the final rule to have such a list. The only controversy with respect to inclusion relates to the Washington State Bar Association as to its trade association functions. The WSBA has filed a minority report [Report, tab 6] explaining why it believes it should be excluded from the rule. A judicial officer is not an agency under the rule and is not separately subject to any disclosure request.

Judicial branch records are divided into three general categories: case records, chambers records, and administrative records. Case records continue to fall under existing rules (including appropriate sections of GR 31) and common law.

New rules are proposed for administrative records which have parallels in the PRA. They include the requirement to appoint a public records officer, procedures for making and responding to requests for records, public notice of that contact and procedure, disclosure/nondisclosure provisions, a listing of exemptions in addition to those falling under federal law, state law, and court rule, and the requirement for judicial entities to develop a public records policy. The rule includes an expedited appeals process and limited sanctions. The rule does not allow per diem fines available under the PRA.

Chambers records are a new category of records excluded from disclosure. This is an area of some controversy. Chambers records are neither case records nor administrative records. They are records of the judicial officer and staff, kept under chambers control. They are excluded from the rule to avoid intrusion into the judicial decision making function by virtue of review of those records. The intrusion would occur whether or not a record was ultimately subject to disclosure or not if the rule did not exclude them.

PROPOSED AMENDMENTS TO GR 31
FROM PUBLIC RECORDS WORK GROUP

SEPTEMBER 15, 2010

GR 31 ACCESS TO ~~COURT~~ JUDICIAL RECORDS

(a) Policy and Purpose. It is the policy of the ~~courts~~ judiciary to facilitate access to ~~court~~ judicial records as provided by article I, section 10 of the Washington State Constitution. Access to ~~court~~ judicial records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article 1, section 7 of the Washington State Constitution, restrictions in statutes, restrictions in court rules, and as required for the integrity of judicial decision-making. ~~and~~ Access shall not unduly burden the business of the ~~courts~~ judiciary.

[COMMENT: The work group expanded this provision so that it applies to all judicial records (not only case records) and all judicial agencies (not just courts).]

(b) Scope. This rule governs the right of public access to judicial records. This rule applies to all ~~court~~ judicial records, regardless of the physical form of the ~~court~~ record, the method of recording the ~~court~~ record or the method of storage of the ~~court~~ record. ~~Administrative records are not within the scope of this rule.~~ ~~Court~~ Case records are further governed by GR 22.

[COMMENT: The work group expanded this provision so that it applies to all judicial records, not just case records.]

(c) Application of Rule.

(1) This rule applies to the following judicial agencies:

A. The Supreme Court and the Court of Appeals;

B. The superior, district, and municipal courts;

C. Board for Judicial Administration;

D. Administrative Office of the Courts;

E. Judicial Information System Committee;

F. Minority and Justice Commission;

G. Gender and Justice Commission;

H. Board for Court Education;

I. Interpreter Commission;

J. Certified Professional Guardian Board;

K. Commission on Children in Foster Care;

L. Washington State Pattern Jury Instruction Committee;

M. Pattern Forms Committee;

N. Court Management Council;

O. Bench Bar Press Committee;

P. Judicial Ethics Advisory Committee;

Q. Office of Public Guardianship;

R. Washington Center for Court Research;

S. Office of Civil Legal Aid;

T. Office of Public Defense;

U. State Law Library;

V. Washington State Bar Association;

[COMMENT: The work group debated the rule's application to the WSBA. The work group applied the Telford factors for determining which entities are the "functional equivalents" for public agencies under the Public Records Act. The Telford factors are (1) governmental function; (2) level of governmental funding; (3) extent of governmental involvement or regulation; and (4) creation by government. The work group concluded that the WSBA was the functional equivalent of a judicial agency for purposes of the proposed rule. The work group considered excluding from the scope of this rule the WSBA's functions as a trade organization (as opposed to its regulatory functions) but rejected this approach because the WSBA's dues are mandatory, making them similar to a government-imposed fee. Existing court rules on public access already address much of the Bar's regulatory activities; it is expected that the existing rules would cover much of the documents for WSBA's regulatory function.]

[A minority report has been filed by Bob Welden on behalf of the WSBA on this item. Minority reports are included earlier in the work group's report.]

W. County clerk's offices with regard to their duties to the superior court and their custody of superior court records;

[COMMENT: In most counties, the county clerk is an independently elected position. The county clerk's office acts as the legal custodian of superior court records, and members of the office act under the supervision of judges in the courtroom, but the office also has duties that are outside the judicial arena. This rule would apply only with regard to the office's duties to the court and its records.]

X. Superior Court Judges Association, District and Municipal Court Judges Association, and similar associations of judicial officers and employees.

[COMMENT: The work group debated whether these associations should be governed by this rule. Just as with the WSBA, the work group looked to the Telford factors and determined that these associations are the

"functional equivalent" of judicial agencies and thus should be covered by the rule.]

Y. All other judicial entities that are overseen by a court, whether or not specifically identified in this section (c)(1); and

Z. All subgroups of the entities listed above, including committees, task forces, commissions, boards, offices, and departments.

[COMMENT: The proposal includes a list of specific judicial agencies, along with catch-all provisions in subparagraphs (Y) and (Z). The work group took this approach to make sure there was no mistake as to the original intentions for the rule's scope. BJA and/or the Supreme Court will have the opportunity to replace the list with a more general definition of "judicial agency."]

(2) This rule does not apply to the Commission on Judicial Conduct. The Commission is encouraged to incorporate any of the provisions in this rule as it deems appropriate.

[COMMENT: The Commission on Judicial Conduct is not governed by a court. The commission has a heightened need for maintaining independence from courts. It would be inappropriate to dictate to the commission its policies on public records.]

(3) A judicial officer is not an agency.

[COMMENT: This provision protects judges and court commissioners from having to respond personally to public records requests. Records requests would instead go to the court's public records officer.]

(4) A person or entity entrusted by a judicial agency with the storage and maintenance of its public records, whether part of a judicial agency or a third party, is not a judicial agency. Such person or entity may not respond to a request for access to judicial records, absent express written authority from the judicial agency or separate authority in rule or statute to grant access to the documents.

[COMMENT: Judicial e-mails and other documents sometimes reside on IT servers, some are in off-site physical storage facilities. This provision prohibits an entity that operates the IT server from disclosing judicial records. The entity is merely a bailee, holding the records on behalf of the judicial agency, rather than an owner of the records having independent authority to release them. Similarly, if a court puts its paper records in storage with another entity, the other entity cannot disclose the records. In either instance, it is the judicial agency that needs to make the decision as to releasing the records. The records request needs to be addressed by the judicial agency's public records officer, not by the person or entity having control over the IT server or the storage area. On the other hand, if the judicial agency archives its records with the state archivist, relinquishing its own authority as to disposition of the records, the archivist would have separate statutory authority to disclose the records.

~~(c)~~ (d) Definitions.

(1) "Access" means the ability to view or obtain a copy of a ~~court~~ judicial record.

(2) "Administrative record" means ~~any record pertaining to the management, supervision or administration of the judicial branch, including any court, board, or committee appointed by or under the direction of any court or other entity within the judicial branch, or the office of any county clerk.~~ any public record created by or maintained by a judicial agency and related to the management, supervision, or administration of the agency.

> *[COMMENT: The Public Records Work Group has developed a list of categories of records maintained by judicial agencies. The list is annotated with the Work Group's expectation of whether such records are subject to disclosure. The list is found as an appendix to the work group's report. It is intended for illustrative purposes only.]*

(3) "Bulk distribution" means distribution of all, or a significant subset, of the information in ~~court~~ case records, as is and without modification.

(4) "~~Court~~ Case record" includes, but is not limited to: (i) Any document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding, and (ii) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created or prepared by the court that is related to a judicial proceeding. ~~Court~~ Case record does not include ~~data maintained by or for a judge pertaining to a particular case or party, such as personal notes and communications, memoranda, drafts, or other working papers;~~ administrative records; chambers records; or information gathered, maintained, or stored by a government agency or other entity to which the court has access but which is not entered into the record.

(5) (a) "Chambers record" means any writing that is created by or maintained by any judicial officer or chambers staff, and is maintained under chambers control, whether directly related to an official judicial proceeding or other chambers activities. "Chambers staff" means a judicial officer's law clerk and any other staff when providing support directly to the judicial officer at chambers.

(b) Chambers records are not public records. Case records and administrative records do not become chambers records merely because they are in the possession or custody of a judicial officer.

[COMMENT: Access to chambers records could necessitate a judicial officer having to review all records to protect against disclosing case sensitive information or other information that would intrude on the independence of judicial decision making. This would effectively make the judicial officer a de facto public records officer and could greatly interfere with judicial functions. Records may remain under chambers control even though they are physically stored elsewhere. However, records that are otherwise subject to disclosure should not be allowed to be moved into chambers control as a means of avoiding disclosure.]

~~(5)~~ (6) "Criminal justice agencies" are government agencies that perform criminal justice functions pursuant to statute or executive order and that allocate a substantial part of their annual budget to those functions.

~~(6)~~ (7) "Dissemination contract" means an agreement between a ~~court~~ case record provider and any person or entity, except a Washington State court (Supreme Court, court of appeals, superior court, district court or municipal court), that is provided ~~court~~ case records. The essential elements of a dissemination contract shall be promulgated by the JIS Committee.

~~(7)~~ (8) "Judicial Information System (JIS) Committee" is the committee with oversight of the statewide judicial information system. The judicial information system is the automated, centralized, statewide information system that serves the state courts.

~~(8)~~ (9) "Judge" means a judicial officer as defined in the Code of Judicial Conduct (CJC) Application of the Code of Judicial Conduct Section (A).

~~(9)~~ (10) "Public" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency, however constituted, or any other organization or group of persons, however organized.

~~(10)~~ (11) "Public purpose agency" means governmental agencies included in the definition of "agency" in RCW 42.17.020 and other non-profit organizations whose principal function is to provide services to the public.

(12) "Public record" includes any writing, except chambers records, containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any judicial agency regardless of physical form or characteristics.

COMMENT: The definition is adapted from the Public Records Act. The work group added the exception for chambers records, for consistency with other parts of the proposed rule.]

(13) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

[COMMENT: The definition is taken from the Public Records Act.]

~~(d)~~ (e) ~~Access~~ Case Records.

(1) **Right of Access to Case Records.** The public shall have access to all ~~court~~ case records except as restricted by federal law, state law, court rule, court order, or case law.

~~(e)~~ (2) Personal Identifiers Omitted or Redacted from ~~Court~~ Case Records

~~(1)~~ (A) Except as otherwise provided in GR 22, parties shall not include, and if present shall redact, the following personal identifiers from all documents filed with the court, whether filed electronically or in paper, unless necessary or otherwise ordered by the Court.

~~(A)~~ (1) Social Security Numbers. If the social security number of an individual must be included in a document, only the last four digits of that number shall be used.

~~(B)~~ (2) Financial Account Numbers. If financial account numbers are relevant, only the last four digits shall be recited in the document.

~~(C)~~ (3) Driver's License Numbers.

~~(2)~~ (B) The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Court or the Clerk will not review each pleading for compliance with this rule. If a pleading is filed without redaction, the opposing party or identified person may move the Court to order redaction. The court may award the prevailing party reasonable expenses, including attorney fees and court costs, incurred in making or opposing the motion.

COMMENT

This rule does not require any party, attorney, clerk, or judicial officer to redact information from a ~~court~~ case record that was filed prior to the adoption of this rule.

~~(f)~~ (3) Distribution of ~~Court~~ Case Records Not Publicly Accessible

~~(1)~~ (A) A public purpose agency may request ~~court~~ case records not publicly accessible for scholarly, governmental, or research purposes where the identification of specific individuals is ancillary to the purpose of the inquiry. In order to grant such requests, the court or the Administrator for the Courts must:

~~(A)~~ (1) Consider: (i) the extent to which access will result in efficiencies in the operation of the judiciary; (ii) the extent to which access will fulfill a legislative mandate; (iii) the extent to which access will result in efficiencies in other parts of the justice system; and (iv) the risks created by permitting the access.

~~(B)~~ (2) Determine, in its discretion, that filling the request will not violate this rule.

~~(C)~~ (3) Determine the minimum access to restricted ~~court~~ case records necessary for the purpose is provided to the requestor.

~~(D)~~ (4) Assure that prior to the release of ~~court~~ case records under section ~~(f) (1)~~ (e)(3)(A), the requestor has executed a dissemination contract that includes terms and conditions which: (i) require the requester to specify provisions for the secure protection of any data that is confidential; (ii) prohibit the disclosure of data in any form which identifies an individual; (iii) prohibit the copying, duplication, or dissemination of information or data provided other than for the stated purpose; and (iv) maintain a log of any distribution of ~~court~~ case records which will be open and available for audit by the court or the Administrator of the Courts. Any audit should verify that the ~~court~~ case records are being appropriately used and in a manner consistent with this rule.

~~(2)~~ (B) Courts, court employees, clerks and clerk employees, and the Commission on Judicial Conduct may access and use ~~court~~ case records only for the purpose of conducting official court business.

[COMMENT: The work group received a request from the Office of Public Defense to expand the provision above to address access by OPD and OCLA to case

records. The work group declined to incorporate this request, as it is beyond the scope of the work group's charge to address the public's access to judicial records.]

~~(3)~~ (C) Criminal justice agencies may request ~~court~~ case records not publicly accessible.

~~(A)~~ (1) The provider of ~~court~~ case records shall approve the access level and permitted use for classes of criminal justice agencies including, but not limited to, law enforcement, prosecutors, and corrections. An agency that is not included in a class may request access.

~~(B)~~ (2) Agencies requesting access under this section of the rule shall identify the ~~court~~ case records requested and the proposed use for the ~~court~~ records.

~~(C)~~ (3) Access by criminal justice agencies shall be governed by a dissemination contract. The contract shall: (i) specify the data to which access is granted; (ii) specify the uses which the agency will make of the data; and (iii) include the agency's agreement that its employees will access the data only for the uses specified.

~~(g)~~ (4) Bulk Distribution of ~~Court~~ Case Records

~~(1)~~ (A) A dissemination contract and disclaimer approved by the JIS Committee for JIS records or a dissemination contract and disclaimer approved by the court clerk for local records must accompany all bulk distribution of ~~court~~ case records.

~~(2)~~ (B) A request for bulk distribution of ~~court~~ case records may be denied if providing the information will create an undue burden on court or court clerk operations because of the amount of equipment, materials, staff time, computer time or other resources required to satisfy the request.

~~(3)~~ (C) The use of ~~court~~ case records, distributed in bulk form, for the purpose of commercial solicitation of individuals named in the ~~court~~ case records is prohibited.

~~(h)~~ (5) Appeals Relating to JIS Records. Appeals of denials of access to JIS records maintained at state level shall be governed by the rules and policies established by the JIS Committee.

~~(i)~~ **(6) Notice.** The Administrator for the Courts shall develop a method to notify the public of access to ~~court~~ case records and the restrictions on access.

(f) Administrative Records.

(1) Administrative Records—Right of Access.

A. ~~The public has a right of access to all administrative records except as exempted by federal laws, state laws, this rule and other court rules, court orders, or case law.~~

The public has a right of access to judicial agency administrative records unless access is exempted or prohibited under this rule, other court rules, federal statutes, state statutes, court orders, or case law. To the extent that records access would be exempt or prohibited under the Public Records Act, Chapter 42.56 RCW, access is also exempt or prohibited under this rule. In addition, to the extent required to prevent a significant risk to individual privacy or safety, an agency shall delete identifying details in a manner consistent with this rule when it makes available or publishes any public record; however, in each instance, the justification for the deletion shall be provided fully in writing.

[COMMENT: The paragraph states that administrative records are open to public access unless an exemption or prohibition applies. The paragraph's final sentence allows agencies to redact information from documents based on significant risks to privacy or safety.]

B. In addition to exemptions referred to in paragraph (A) above, the following categories of administrative records are exempt from public access:

(1) Requests for judicial ethics opinions;

[COMMENT: This exemption was requested by the Judicial Ethics Advisory Committee.]

(2) Identity of writing assignment judges in the appellate courts prior to issuance of the opinion;

[COMMENT: This exemption was suggested by Judge Quinn Brintnall at a BJA meeting.]

(3) Minutes of meetings held by judges within a court;

[COMMENT: The work group discussed whether meeting minutes should be broadly exempted from public access, or whether some smaller subset of such minutes should be exempted. The work group voted in favor of the broad exemption; a minority report may be written on this point.]

(4) Evaluations and recommendations for candidates seeking appointment or employment within a judicial agency;

[COMMENT: Requested by the WSBA, with regard to evaluations and recommendations for judicial appointments. The provision has been broadened to cover similar documents maintained by other judicial agencies.]

(5) Personal identifying information, including individuals' home contact information, Social Security numbers, driver's license numbers, and identification/security photographs;

[COMMENT: The exemption was requested by staff for the Office of Public Defense. The work group considered including private financial information in this provision, but ultimately concluded that financial information is already addressed in the Public Records Act's exemptions. The work group discussed whether dates of birth should be included here, but did not reach consensus.

(6) An attorney's request to a judicial agency for a trial or appellate court defense expert, investigator, or social worker, any report or findings submitted to the attorney or judicial agency by the expert, investigator, or social worker, and the invoicing and payment of the expert, investigator or social worker, but only during the pendency of the case;

[COMMENT: The exemption was requested by the Office of Public Defense.]

(7) Documents, records, files, investigative notes and reports, including the complaint and the identity of the complainant, associated with a judicial agency's internal investigation of a complaint against the agency or its contractors during the course of the investigation. The outcome of the agency's investigation is not exempt.

[COMMENT: The exemption was requested by the Office of Public Defense.]

(8) Manuals, policies, and procedures, developed by Bar staff, that are directly related to the performance of investigatory, disciplinary, or regulatory functions, except as may be specifically made public by court rule.

[COMMENT: The exemption was requested by the Washington State Bar Association.]

[COMMENT: The work group also received proposals for several additional exemptions, but decided against including them here. The proposals were to exempt:

- *Investigative records of regulatory or disciplinary agencies. (The work group lacked sufficient information about the variety of*

practices that the judicial agencies use in order to draft appropriate language.)

- *Private financial information, including financial account numbers. (The work group determined that this information is already protected under the Public Records Act.)*
- *Dockets/index information for protected case types. (The work group determined that this information is already protected.)*
- *Copyrighted information. (The work group lacked sufficient information to draft appropriate language.)*
- *Testing/screening materials/results. (The work group determined that this information is already protected under the Public Records Act.)*
- *Performance measures for evaluating court processes. (The work group decided that this information should generally be open to public access, even if the information is subject to public misinterpretation.)*

C. **Access to Juror Information.** Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, or member of the public, may petition the trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

[COMMENT: This provision was moved here from later in the rule.]

D. **Access to Master Jury Source List.** Master jury source list information, other than name and address, is presumed to be private. Upon a showing of good cause, the court may permit a petitioner to have access to relevant information from the list. The court may require that the information not be disclosed to other persons.

[COMMENT: This provision was moved here from later in the rule.]

(2) Administrative Records—Process for Access.

A. Administrative Records—Procedures for Records Requests.

(1) AGENCIES TO ADOPT PROCEDURES. Each judicial agency must adopt a policy implementing this rule and setting forth its procedures for accepting and responding to public records requests. The agency's policy must include the designation of a public records officer and must require that requests for access be submitted in writing to the agency's designated public records officer. Best

practices for handling public records requests shall be developed under the authority of the Board for Judicial Administration.

(2) PUBLICATION OF PROCEDURES FOR REQUESTING PUBLIC RECORDS. Each judicial agency must prominently publish the procedures for requesting access to its records. If the agency has a website, the procedures must be included there. The publication shall include the public records officer's work mailing address, telephone number, fax number, and e-mail address.

(3) INITIAL RESPONSE. Each judicial agency must initially respond to a written request for access to a public record within five working days of its receipt. The response shall acknowledge receipt of the request and include a good-faith estimate of the time needed to respond to the request. The estimate may be later revised, if necessary. For purposes of this rule, "working days" mean days that the judicial agency, including a part-time municipal court, is open.

(4) COMMUNICATION WITH REQUESTER. Each judicial agency must communicate with the requester as necessary to clarify the records being requested. The agency may also communicate with the requester in an effort to determine if the requester's need would be better served with a response other than the one actually requested.

(5) SUBSTANTIVE RESPONSE. Each judicial agency must respond to the substance of the records request within the timeframe specified in the agency's initial response to the request. If the agency is unable to fully comply in this timeframe, then the agency should comply to the extent practicable and provide a new good faith estimate for responding to the remainder of the request. If the agency does not fully satisfy the records request in the manner requested, the agency must justify in writing any deviation from the terms of the request.

(6) EXTRAORDINARY REQUESTS LIMITED BY RESOURCE CONSTRAINTS. If a particular request is of a magnitude that the judicial agency cannot fully comply within a reasonable time due to constraints on the agency's time, resources, and personnel, the agency shall communicate this information to the requester. The agency must attempt to reach agreement with the requester as to narrowing the request to a more manageable scope and as to a timeframe for the agency's response, which may include a schedule of installment responses. If the agency and requester are unable to reach agreement, then the agency shall respond to

the extent practicable and inform the requester that the agency has completed its response.

B. **Administrative Records—Review of Public Records Officer's Response.**

(1) NOTICE OF REVIEW PROCEDURES. The public officer's response to a public records request shall include a written summary of the procedures under which the requesting party may seek further review.

(2) TIMELINE FOR SEEKING REVIEW. The timelines set forth in section (f)(2)(A) shall apply likewise to requests for review of the public records officer's response.

(3) FURTHER REVIEW WITHIN AGENCY. Each agency shall provide a method for review by the agency's director or presiding judge. For an agency that is not a court, the presiding judge shall be the presiding judge of the court that oversees the agency. The agency may also establish intermediate levels of review. The agency shall make publicly available the applicable forms. The review proceeding is informal and summary. The review proceeding shall be held within five working days. If that is not reasonably possible, then within five working days the review shall be scheduled for the earliest practical date.

> *[COMMENT: The work group discussed whether the rule should authorize the director or the presiding chief judge to designate another person to handle these reviews. The work group did not reach agreement on this question.]*

(4) ALTERNATIVE REVIEW. As an alternative to review under section (f)(2)(B)(3), a requesting person may seek review by a person outside the judicial agency. If the judicial agency is a court or directly reportable to a court, the outside review shall be by a visiting judicial officer. If the judicial agency is not a court or directly reportable to a court, the outside review shall be by a person agreed upon by the requesting person and the judicial agency. In the event the requesting person and the judicial agency cannot agree upon a person, the presiding superior court judge in the county in which the judicial agency is located shall either conduct the review or appoint a person to conduct the review. The review proceeding shall be informal and summary. In order to choose this option, the requesting person must sign a written waiver of any further review of the decision by the person outside the judicial agency. The decision by the person outside the judicial agency is final and not appealable. Attorney fees and costs are not available under this option.

[COMMENT: The bifurcated procedures for review are intended to provide flexible, prompt, informal, and final procedures for review of public records decisions. The option for a visiting judge allows a requester to have the review heard by an outside decision-maker; in the interest of obtaining prompt, final decisions, a requester selecting this option would be required to waive further review. If the Legislature creates a new entity to review public records decisions made by agencies of the executive branch, then the work group recommends that the BJA consider using this entity for review of judicial records decisions as well.]

(5) REVIEW IN SUPERIOR COURT.

i. A requester may seek superior court review of a decision made under section (f)(2)(B)(3). The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with section (f)(1) which exempts or prohibits disclosure in whole or in part of specific information or records. Judicial review of all agency actions shall be de novo. The superior court shall apply section (f)(1) of this rule in determining the accessibility of the requested documents. Any ambiguity in the application of section (f)(1) to the requested documents shall be resolved by analyzing access under the common law's public-access balancing test.

[COMMENT: The common law's balancing test is addressed in detail in Cowles Publishing v. Murphy, 96 Wn.2d 584 (1981), and Beuhler v. Small, 115 Wn.App. 914 (2003). Disclosure is balanced against whether it poses a significant risk to individual privacy or safety.]

ii. The right of de novo review is not available to a requester who sought review under the alternative process set forth in section (f)(2)(b)(4).

(6) MONETARY SANCTIONS.

i. In the de novo review proceeding under section (f)(2)(B)(5), the superior court may in its discretion award reasonable attorney fees and costs to a requesting party if the court finds that (1) the agency's response was deficient, (2) the requester specified the particular deficiency to the agency, and (3) the agency did not cure the deficiency.

ii. Sanctions may be imposed against either party under CR 11, if warranted.

iii. Except as provided in sections (6)(i) and (ii), a judicial agency may not be required to pay attorney fees, costs, civil penalties, or fines.

[COMMENT: The work group's recommendation is to initially limit the availability of monetary sanctions against judicial agencies. If the experience with this approach were to show that more significant sanctions are merited, then those could be added at an appropriate time. This approach was also used when the Public Records Act was also originally enacted; it makes sense to take the same approach with this rule. It may well be that the limited sanctions that would be available under this rule, coupled with the rule's creation of speedy review procedures, will be sufficient to ensure compliance without the imposition of additional sanctions.

~~(2)~~ (g) **Judicial Records—Judicial Agency Rules.** Each court by action of a majority of the judges may from time to time make and amend local rules governing access to ~~court~~ judicial records not inconsistent with this rule. Each judicial agency may from time to time make and amend agency rules governing access to its judicial records not inconsistent with this rule.

~~(3)~~ **(h) Judicial Records—Charging of Fees.**

(1) A fee may not be charged to view ~~court~~ judicial records ~~at the courthouse~~.

(2) A fee may be charged for the photocopying or scanning of judicial records. If another court rule or statute specifies the amount of the fee for a particular type of record, that rule or statute shall control. Otherwise, the amount of the fee may not exceed the amount that is authorized in the Public Records Act, Chapter 42.56 RCW.

(3) The agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed within 30 days, the agency is not obligated to fulfill the balance of the request.

[COMMENT: Paragraph (3) above incorporates a modified version of the Public Records Act's "deposit and installments" language.]

(i) Effective Date of Amendment.

(a) The amendment expanding this rule beyond case records goes into effect on January 1, 2012, and applies to all public records requests submitted on or after that date.

[COMMENT: A rule adopted in early 2011 would usually have an effective date of September 1, 2011. The delayed effective date is intended to allow time for development of best practices and for training.]

(b) Until January 1, 2012, public access to judicial documents shall continue to be analyzed using the existing court rules and statutes, as applicable, and the common law balancing test. The Public Records Act, Chapter 42.56 RCW, may be used as non-binding guidelines.

[Adopted effective October 26, 2004; amended effective January 3, 2006.]